THE CONSTITUTIONAL POWER OF STATE LEGISLATURES TO DIRECT ELECTION OF SENATORS BY THE POPULAR ELECTORATE.

The matter of the election of United States Senators is an ever-recurring question in American politics. The difficulty of election by the legislatures is accentuated by deadlocks in some state legislatures which are to elect senators to fill the vacancies which occur in that body on the 4th of March, 1911.

As a matter of state policy, the legislatures would generally direct a popular election if left free to do so—at least this is a fair inference from the memorials to Congress praying that an amendment to the Constitution be submitted which shall vest the right of election directly in the people. Of course the right of election should be with the people under republican institutions. But is this not a question of state rather than of federal policy?

Now, what are the limits of state power over this subject? The Constitution provides: "Art. I, § 3. The Senate of the United States shall be composed of two Senators from each State, Chosen by the Legislature thereof, for six years, and each Senator shall have one vote." There is no prohibition here, that the legislature which has the right to elect the senator, may not direct an election by the electors who elect the legislature, and have it constituted as the organ of their will. If a legislature, proceeding to the election of a United States Senator, becomes involved in a deadlock, it would not be a violation of either legal or constitutional principles for the legislature to submit the question to the popular electorate for determination. It would be precisely like an agent submitting a doubtful point to his principal for decision. It would not constitute a delegation of power to some commission created by the legislature. The people are not the creature of the legislature—the legislature is the creature of the people.

Suppose a legislature, to make a practical test of this question, should pass a special act directing the election of a United States Senator by the general electorate of the state, and should direct the governor to certify the act, together with the returns of the election, to the President of the Senate as the creden-

tials of the Senator from that state, could it be said in advance that the senate acting as the Constitutional "Judge of the Elections, Returns, and Qualifications of its own Members" would entertain a contest over the seat of a Senator elected by direction of the legislature by the legally constituted electorate of the state, when the senate has as a matter of course seated senators chosen by party and factional primaries under a system which has deprived legislatures of all discretion in the matter and has practically abolished their electoral function.

The Constitution provides that "No State, without its Consent, shall be deprived of its equal suffrage in the Senate," and moreover that the Constitution shall not be amended in this respect. If the particular state legislature which has the right to elect voluntarily submits the election to the general state electorate and the state selects the senator by its general electorate, would it not be depriving that state of its equal suffrage in the senate in violation of its constitutional rights, if the senate as judge of the matter should refuse to accord to the credentials of the senator so elected, the force and effect intended by the legislature which has the right to elect the senator. (It is not contended that this can be done by any State Constitution or that the act of one legislature may have any binding effect on any subsequent legislature having the right to elect a senator, except such as should arise through custom in each state.) This method is certainly better supported by legal and sound political principles than the party primary method. And then it leaves the matter as a question of state policy to be adapted to any exigency which may arise. A precedent and ruling by the senate on this point would settle the heedless agitation for the amendment of the Constitution, which is a very delicate matter, as it respects the election of United States Senators,—no provisions of the Constitution can be altered with greater danger to the dignity and equality of the states in the federal system.

Now with respect to the election of Presidential Electors the Constitution provides:

"Article II, § 1, Clause 2. "Each State shall appoint in such Manner as the Legislature may direct a Number of Electors equal to the whole Number of Senators and Representatives

to which the State may be entitled in Congress;" etc. Under this provision, presidential electors were formerly elected by the state legislatures, but are now universally and by direction of the state legislatures elected by the general electorate of the state as constituted by law. Now what effectual difference is there in the legal extent of the Constitutional power of the legislature to elect a senator, and to appoint presidential electors, in such manner as it may direct?

If the clause respecting the election of senators should by amendment or construction be made to read:

"Art. I, § 3. The Senate of the United States shall be composed of two Senators from each State chosen (by the legislature thereof) *in such manner as the legislature thereof may direct,* for six years, and each Senator shall have one vote," there could be no doubt upon the precedents respecting the election of presidential electors, that the state legislature could direct the election of senators by the popular electorate precisely as they do that of presidential electors.

But why amend the Constitution and let down the bars to all sorts of ill-advised schemes to undermine the fundamental law upon which our civil institutions rest for stability and perpetuity? It has taken too many years of controversy, judicial construction and sacrifice of blood and property to establish the Constitution and the authority of the government it created, to now admit of any changes in that great instrument from light and transient causes.

The Constitution already provides:

Article I, § 4. The Times, Places and *Manner* of *holding elections for Senators* and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any Time by Law make or alter such regulations, except as to the Place of Choosing Senators."

Under this section the state legislatures for a long period of our Constitutional history prescribed by law the manner of electing senators. By the Act of July 25th, 1866, Congress made certain regulations, respecting the election of senators; these regulations, however, are directory in their nature and should not be permitted to stand against the inviolable Con-

stitutional right of each state to its equal suffrage in the senate. If Congress is converted to the election of senators by popular vote, why should not the Act of 1866 be repealed and thus leave each state to the exercise of its full Constitutional power to direct the election of the senators in such manner as the legislature thereof may prescribe?

It is for the United States Senate to construe these provisions of the Constitution, and they would be construed with a view to place no unnecessary restrictions on the right of each state to its equal suffrage in the senate. The Constitution does not forbid the election of United States Senators by the people, but rather commits the matter to legislative discretion. There is a rational and practicable way to accomplish this, without amending the Constitution or violating any sound legal or political principle. There is no need to change a syllable of the old Constitution. It is adequate for the union, liberty and welfare of the people of the United States, and it is their highest duty to transmit it to posterity unimpaired.

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